Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1831

LAURENCE A. HECKER
Petitioner,

vs.

TOWNSHIP OF DOVER
Respondent.

STATEMENT IN OPPOSITION TO
PETITION FOR CERTIORARI
To the New Jersey Supreme Court

RAYMOND A. HAYSER, ESQ.
33 Washington Street
Toms River, New Jersey 08753
Attorney for Respondent

WILLIAM J. LINTON, ESQ.
of Counsel and on the Statement

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED. 3

CONSTITUTIONAL PROVISIONS INVOLVED . . 3

REASONS WHY THE WRIT SHOULD BE DENIED. 3

AS TO QUESTION 1. 4

AS TO QUESTION 2. 7

AS TO QUESTION 3. 11

CASES CITED:

Abel v. Elizabeth Board of Works, 63 N.J. Super. 500 (App. Div., 1960) 10

Edelman v. California, 344 U.S. 357 (1953) 10

Epstein v. Kuvin, 23 N.J. Super. 129 (App. Div., 1955). 10

Gargano v. Venezio, 37 N.J. Super. 129 (App. Div., 1955). 9

In re Glauberman, 107 N.J. Eq. 384 (E.& A., 1930). 10

Henry v. Mississippi, 379 U.S. 443 (1965) 6, 13, 14

Michel v. Louisiana, 350 U.S. 91 (1955). 15

Township of Dover v. Hecker, 82 N.J. 296 (1979). 1

STATUTES CITED:

U.S. Constitution, Amendment 14. . . . 3
28 U.S.C. 1257, 1257(3). 2, 3, 7

RULES OF THIS COURT CITED:

U.S. Sup. Ct. Rule 19(1)(a), 28 U.S.C.A. 2

U.S. Sup. Ct. Rule 23(1)(b)(iii), 28 U.S.C.A.. 3

RULES OF THE COURT OF THE STATE OF NEW JERSEY CITED:

R. 1:8-8 . . . . . ,12

R. 1:12-2. 9

R. 4:40-1. 5

OTHER AUTHORITIES CITED:

New Jersey Auto Law, §§ 1-1855 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

LAURENCE A. HECKER
Petitioner,

vs.

TOWNSHIP OF DOVER
Respondent.

STATEMENT IN OPPOSITION TO
PETITION FOR CERTIORARI
To the New Jersey Supreme Court

Respondent, Township of Dover, hereby opposes the granting by this Honorable Court of a writ of certiorari to review the judgment of the New Jersey Supreme Court entered on February 11, 1980, in Township of Dover v. Hecker, Docket No. C-420, Supreme Court of New Jersey, 1979, affirming a judgment

against petitioner in a civil action.

OPINIONS BELOW

The decisions of the New Jersey Supreme Court and of the Appellate Division of the Superior Court of New Jersey relevant hereto are annexed to the Petition for Certiorari herein. The denial of the Petition for Certiorari to the Supreme Court of New Jersey is reported at 82 N.J. 296 (1979); the opinion of the Appellate Division is unreported.

JURISDICTION

Respondent asserts that no original jurisdiction of this Court solely based upon the Fourteenth Amendment to the Constitution of the United States exists herein, and that a grant of certiorari herein would be improvident by virtue of the provisions of U.S. Sup. Ct. Rule 19 (1) (a), 28 U.S.C.A. and 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The questions presented for this Court's review are set forth in the Petition, at 2 - 3.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts the applicability of U.S. Constitution, Amendment 14.

REASONS WHY THE WRIT SHOULD BE DENIED

It should be noted by way of preface that the within Petition is entirely devoid of a valid jurisdictional statement as required by U.S. Supreme Court Rule 23 (1) (b) (iii), 28 U.S.C.A. Petitioner apparently seeks to have this Court grant certiorari herein based entirely upon an alleged original jurisdiction of this Court under the Fourteenth Amendment to the United States Constitution. Such an allegation is outside the purview of the appropriate jurisdictional statute, 28 U.S.C. §1257 (3), and this lack in and of itself is

sufficient to defeat the jurisdiction in certiorari of this Court. However, the allegations of the Petition will be treated on their merits herein, notwithstanding this absence of jurisdiction, for the guidance of the Court.

AS TO QUESTION 1: Petitioner alleges before this Court, for the first time anywhere, that the placing of the testimony of witnesses Brune and Gilroy before the jury denied him fundamental fairness under the Fourteenth Amendment. Such an argument is clearly without merit.

The gravamen of petitioner's argument is that, since the testimony of Brune and Gilroy went to an issue on which judgment was granted in defendant-petitioner's favor at the close of plaintiff-respondent's case, the entry of that judgment precluded

his introduction of rebuttal testimony and thus deprived him of a fair trial. What petitioner omits is that the grant of judg ment was on his own motion. The Rules Governing the Courts of the State of New Jersey, specifically R. 4:40-1, permit the making of a motion for judgment either at the close of the evidence offered by any party or at the close of all the evidence:

> Rule 4:40-1 Motion for Judgment at Trial.
>
> "A motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent. If the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserved the right to do so. A motion for judgment which is denied is not a waiver of trial by jury even if all parties to the action have so moved."

Counsel for petitioner apparently chose for tactical reasons to make the motion

at the close of plaintiff's case rather than at the close of all the evidence. The statement by petitioner on Page 7 of his Petition that the only alternatives were 1) to move at the close of plaintiff's case or 2) to permit the matter to go to the jury, is simply inaccurate in light of the Rule. This Court has previously addressed the question of its jurisdiction over possible due process violations created by a tactical decision of State trial counsel pursuant to a valid State procedural rule. Henry v. Mississippi, 379 U.S. 443 (1965), at 447-449. The test, according to Henry, supra, is whether the procedural rule in question serves a legitimate State purpose or is merely a pretext for the abrogation of Federally protected rights. Petitioner has not alleged, and does not allege here, that Rule 4:40-1 serves no legitimate state interest, or that it is violative of

any Federally protected right. Absent such a Federal question properly raised below, this Court is without jurisdiction to hear such a challenge--even if raised in the Petition--by way of certiorari. 28 U.S.C. §1257; Henry, supra. (It might be noted parenthetically that the Appellate Division of the Superior Court of New Jersey described this argument on appeal as "frivolous" under State law and procedure. Appellate Division opinion, page 22.)

AS TO QUESTION 2: Apparently petitioner now feels that the inclusion of certain matters pertaining to his post-judgment conduct created prejudice in the minds of the Appellate Division judges hearing the case on appeal. It should be noted that the matter complained of was a part of the Court's record of the case in any event--and was merely a recitation

in an affidavit by respondent's counsel of various statements of petitioner, taken under oath at supplemental proceedings in aid of the judgment, in which petitioner testified as to various transfers of assets outside the State of New Jersey in order to avoid levy. Respondent, upon taking the aforementioned testimony, moved for the issuance of a writ of capias ad satisfactiendum, which writ was issued as a part of the proceedings herein. A complete record of the proceedings below, then, had to include the issuance of the writ and its supporting documents. It should also be noted that a hearing was held on petitioner's application for a stay of the writ, at which hearing petitioner produced absolutely no evidence in rebuttal of that adduced by respondent--as indeed he could not, since the evidence

adduced by respondent was from petitioner's own mouth.

Notwithstanding the above, however, it must be noted that petitioner at no time--either before the Appellate Division or before the New Jersey Supreme Court--moved to strike the allegedly offensive material or for the disqualification of the appellate panel. R. 1:12-2 of the New Jersey Court Rules states:

> Rule 1:12-2 Disqualification on Party's Motion.
>
> "Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

Motions to strike portions of the appendix are not specifically addressed in the Rules but there is ample New Jersey authority for the striking of impertinent, scandalous, or other improper matter from pleadings on appeal. Cf. Gargano v. Venezio, 37 N.J. Super.

129 (App. Div., 1955); Abel v. Elizabeth Board of Works, 63 N.J. Super. 500, 509 (App. Div., 1960); In re Glauberman, 107 N.J. Eq. 384 (E. & A., 1930); Epstein v. Kuvin, 23 N.J. Super. 482 (App. Div., 1952), and cases cited therein. Even in light of the absence of any specific New Jersey rule on point and affording petitioner the benefit of the doubt as to the proper procedure before the Appellate Division, it is clear that this is a matter that could properly have been raised before the Supreme Court of New Jersey. It was not. It is therefore not within the province of this Court to consider even if it presents a Federal question (which, it is submitted, it clearly does not). Edelman v. California, 344 U.S. 357, 358 (1953); Henry v. Mississippi, supra.

AS TO QUESTION 3: Petitioner's argument rests on the following two points: a) The Appellate Division's ruling demonstrated a lack of familiarity with the record and was therefore violative of due process of law; and b) For the Appellate Division to have required petitioner's counsel to object to specific aspects of Exhibit J-1 at trial would have been to place "an unreasonable burden" on petitioner and his counsel. (Petition, at 14).

As to the first argument, that aspects of Exhibit J-1 were not supported by the record, petitioner's complaint is met by the Appellate Division's ruling that his counsel should have pointed out to the trial court what specific aspects of J-1 were in fact unsupported and objectionable so that the exhibit could be modified. (It should be noted that the "J" designation stands for a judicial, not a joint, exhibit.) Petition-

er's counsel chose merely to object to the entire document's admission--leaving the trial court with the choice to either admit it entirely or strike it entirely. The applicable Rule is R. 1:8-8, which states:

> Rule 1:8-8 Papers, Exhibits, etc., to Jury Room.
>
> "The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties."

Petitioner does not challenge the constitutionality of R. 1:8-8 either before this Court or below. Petitioner's counsel below made a tactical election not to make specific challenges

to the exhibit. Presuming the underlying rule valid under State law, the challenge before this Court must be denied under this Court's decision in Henry v. Mississippi, supra, as the trial strategy of petitioner's counsel amounted to a deliberate bypass of a valid and available State remedy.

To state that making specific objections to Exhibit J-1 would place an undue burden on petitioner's counsel is ludicrous. Petitioner's trial counsel has been admitted to the Bar of New Jersey since 1953, and has a reputation as a fine trial attorney. In point of fact, petitioner's counsel is the chief author of a three-volume treatise on pretrial and trial practice in New Jersey, see New Jersey Auto Law, §§ 1-1855. It is also noteworthy that petitioner is also a member of the New Jersey Bar and has been so since 1965. For petitioner to say that two

attorneys with a combined total of 38 years' experience at the bar could not together determine which parts of an exhibit conformed to the trial proofs strains credulity, to say the least.

Petitioner's argument that his counsel stated the risks inherent in submitting J-1 to the jury is accurate; however, counsel made absolutely no effort to state which parts of J-1 would create those risks. Under those circumstances, the court correctly ruled that the exhibit was on the whole admissible and properly admitted it. Trial counsel could have handled the matter differently and in a way that might have rectified the alleged wrong; as he made a tactical election under a valid State rule to handle the matter as he did, such election may not be challenged before this Court on due process grounds. Henry v. Mississippi, supra.

In sum, then, each of petitioner's grounds for seeking certiorari to the Supreme Court of New Jersey have been shown to be improper. There has been no Federal question in any way raised below; petitioner's assignments of error, if error at all, are clearly based upon adequate State grounds, cf. Michel v. Louisiana, 350 U.S. 91 (1955); and Edelman v. California, supra; and the tactical elections of petitioner under State procedures preclude this Court from review. Henry, supra.

For the aforestated reasons, then, respondent respectfully prays that this Court deny to petitioner the issuance of a writ of certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

RAYMOND A. HAYSER, ESQ.
Attorney for Respondent

BY: WILLIAM J. LINTON, ESQ.